Supreme Court, U.S.
FILED
AUG 20 1985
JOSEPH F. SPANIOL
CLERK

No. 85-52

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners,

v.

ABINGTON MEMORIAL HOSPITAL, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROLAND MORRIS
JANE DALTON ELLIOTT
DAVID E. LODER

DUANE, MORRIS & HECKSCHER
One Franklin Plaza
Philadelphia, PA 19102
(215) 854-6300

Attorneys for Respondents

August 19, 1985

BEST AVAILABLE COPY

24 pp

COUNTER STATEMENT OF QUESTION PRESENTED

Should this Court deny certiorari, where the Third Circuit Court of Appeals in reviewing the malpractice rule, which established a unique exception to the method of calculating Medicare reimbursement for the cost of malpractice insurance, properly determined that

(1) the rule was invalid because the Secretary of the Department of Health and Human Services:

(a) failed to comply with the notice and comment requirements of the Administrative Procedure Act ("APA") 5 U.S.C. § 553;

(b) promulgated a rule which is arbitrary, capricious and an abuse of her discretion and substantively invalid under the APA, 5 U.S.C. § 706(2)(A);

(c) promulgated a rule which is substantively invalid under the Medicare Act because it failed to reimburse hospitals for reasonable costs actually incurred in providing services to Medicare patients; and that

(2) respondents should be reimbursed for the 1979-80 cost reporting year under the traditional utilization reimbursement method?

TABLE OF CONTENTS

	Page
COUNTER STATEMENT OF QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
COUNTERSTATEMENT OF THE CASE	1
A. The Medicare Act	2
B. The Utilization Method	3
C. The Malpractice Rule	3
D. Proceedings Below	5
REASONS FOR DENYING THE PETITION	7
I. There Is No Conflict Among The Circuit Courts.	7
A. All Seven Circuit Courts and Substantially All District Courts Have Invalidated the Malpractice Rule	7
B. The Remand of *Boswell* Because of the Inadequate Record Does Not Establish Conflict Among the Circuits	9
II. The Limited Relief Ordered By The Third Circuit Has Been Unanimously Applied By The Other Courts Considering The Issue	10
III. Vacating The Decision And Remanding The Case Will Cause Manifest Injustice To Respondents And Will Overwhelm The Courts With Duplicative Litigation	12
CONCLUSION	16

TABLE OF AUTHORITIES

CASES:	Page
Abington Memorial Hospital v. Heckler, 576 F.Supp. 1081 (E.D.Pa. 1983) *aff'd,* 750 F.2d 242 (3d Cir. 1984)	7,8,9,13
Action on Smoking and Health v. CAB, 713 F.2d 795 (D.C. Cir. 1983)	11,15
Adair County Health Center Inc. v. Heckler, Civ. No. 84-771-E (W.D. Okla. July 25, 1985)	8
Albany General Hospital v. Heckler, 584 F.Supp. 614 (D. Ore. 1984)	8
Alexandria Hospital v. Heckler, 586 F.Supp. 581 (E.D.Va. 1984); *aff'd,* No. 84-1672 (4th Cir. August 14, 1985	8
Arkansas Methodist Hospital, et al. v. Heckler, Civ. Nos. J-C-83-146, J-C-83-148 (E.D.Ark. Nov. 1, 1984)	8
Athens Community Hospital v. Heckler, 565 F.Supp 695 (E.D. Tenn. 1983)	8
Bedford County Memorial Hospital v. Health and Human Services, 583 F.Supp. 367 (W.D.Va. 1984); *Aff'd,* No. 84-1672 (4th Cir. August 14, 1985)	8,11,13
Benton County General Hospital v. Heckler, Civ. No. 82-1289 (W.D. Tenn. Oct. 25, 1983)	8
Bethesda Hospital v. Heckler, Civ. No. C-1-83-622 (S.D.Ohio Apr. 30, 1985)	8
Brentwood Hospital Inc. v. Heckler, No. 83-0502 (W.D. La. July 3, 1985)	8,9,12,13
Charter Medical Corp. v. Heckler, 604 F.Supp. 638 (M.D.Ga. 1985)	8,12,13
Chelsea Community Hospital v. Heckler, Civ. No. 83-6126-AA (E.D.Mich. Dec. 20, 1983)	8
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1973)	14
Cumberland Medical Center v. Heckler, 578 F.Supp. 39 (M.D. Tenn. 1983)	8

	Page
Daughters of Miriam Center for the Aged v. Matthews, 590 F.2d 1250 (3d Cir. 1978)	13
DeSoto General Hospital v. Heckler, Civ. No. 83-1050-B (M.D.La. June 22, 1984), *aff'd* No. 84-3577 (5th Cir. July 5, 1985)	7,8,9,11
East Jefferson General Hospital v. Heckler, Civ. No. 83-4107-C (E.D.La. Oct. 19, 1984)	8
Greene v. United States, 376 U.S. 149 (1964)	14
Heckler v. Community Health Services of Crawford County, Inc., ____U.S.____, 104 S.Ct. 2218 (1984)	13
Humana of Aurora, Inc. d/b/a Aurora Community Hospital v. Heckler, Civ. No. 83-z-70 (D.Colo. Sept. 25, 1983), *rev'd,* 753 F.2d 1579 (10th Cir. 1985)	7,8,9
Humana of Illinois, Inc. d/b/a Springfield Community Hospital v. Heckler, 584 F.Supp. 618 (C.D.Ill. 1984), *aff'd,* Nos. 84-1478, 84-1727 (7th Cir. Apr. 18, 1985)	8
Kingsbrook Jewish Medical Center v. Richardson, 406 F.2d 663 (2d Cir. 1973)	13
Lifemark Hospitals of Texas, Inc. v. Heckler, Civ. No. G-83-315 (S.D. Tex. August 13, 1985)	8,12
Lloyd Noland Hospital and Clinic v. Heckler, Civ. No. 83-PT-0868-S (N.D.Ala Apr. 6, 1984), *aff'd,* 762 F.2d 1561 (11th Cir. 1985)	7,8,9,11, 13
Marshalltown Area Community Hospital v. Heckler, Civ. No. 84-226-B (S.D.Iowa Dec. 17, 1984)	8,12,13
Menorah Medical Center v. Heckler, Civ. No. 83-0822-CV-W-4 (W.D.Mo. July 26, 1984) *aff'd* No. 84-2257 (8th Cir. July 24, 1985)	7,8,9,11, 12,13
Mercy Medical Center and Unity Medical Center v. Heckler, Civ. No. 3-82 Civ. 1724 (D.Minn. Aug. 17, 1984)	8,12,13
Metropolitan Hospital, Inc. v. Heckler, Civ. No. C83-502A (N.D.Ga. June 25, 1984), *aff'd* Nos. 84-7444, 84-8699 (11th Cir. June 12, 1985)	8
Mt. Carmel Mercy Hospital v. Heckler, 581 F.Supp. 1311 (E.D. Mich. 1983)	8

	Page
Normandy Osteopathic-North Hospital v. Heckler, Civ. No. 83-1687C(1) (E.D.Mo. Dec. 21, 1984) appeal docketed No. 85-1247 (8th Cir. Feb. 19, 1985) (Motion for Summary reversal filed Aug. 8, 1985).	9
Northwest Hospital Inc. v. Hospital Service Corp., 687 F.2d 985 (7th Cir. 1982)	12
Parkway Medical Center, et al. v. Heckler, Civ. Nos. 83-1005, 83-1700 (S.D.Fla. Sept. 24, 1984)	8
Roosevelt Campobello Intern Park v. U.S.E.P.A., 684 F.2d 1034 (1st Cir. 1982)	14
Sisters of St. Mary, et al. v. Heckler, Civ. Nos. 83-0789C(4), 83-1604C(C) (E.D.Mo. Nov. 6, 1984).	8
St. Anthony Regional Hospital, et al. v. Heckler, Civ. No. C-84-37 (N.D. Iowa Oct. 12, 1984)	8
St. James Hospital v. Heckler, 579 F.Supp. 757 (N.D.Ill. 1984), *aff'd,* 760 F.2d 1460 (7th Cir. 1985)	7,8,9
St. Joseph's Hospital v. Heckler, 583 F.Supp. 1545 (D.Ariz. 1984)	8
Tallahassee Memorial Regional Med. Ct. v. Heckler, No. TCA 83-7128-WS (N.D. Fla. June 21, 1985) ..	8
Walter O. Boswell Memorial Hospital v. Heckler, 573 F.Supp. 884 (D.D.C. 1983), *remanded* 749 F.2d 788 (D.C. Cir. 1984)	2,3,7, 8,9,10

Page

STATUTES AND REGULATIONS:

Administrative Procedure Act 6,11
5 U.S.C. 553 i
5 U.S.C. 706(1)(2)(A)(D) 11
5 U.S.C. 706 (2)(A) i,6

Social Security Act, Tit. XVIII, 42 U.S.C. 1395 *et seq*. 2
42 U.S.C. 1395(f)(b) 2
42 U.S.C. 1395ff 11
42 U.S.C. 1395x(v)(1)(A) 2,5
42 U.S.C. 1395oo(f)(1) 5
42 U.S.C. 1395ww 2
42 C.F.R. 405.452(b)(1)(i) 3
42 C.F.R. 405.452(b)(1)(ii) 2
50 Fed. Reg. (1985):
p. 25179 13,16

Provider Reimbursement Manual, Chapter 22 (HIM-15) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners,

v.

ABINGTON MEMORIAL HOSPITAL, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

COUNTERSTATEMENT OF THE CASE

This Honorable Court should deny the petition for a writ of certiorari because every court of appeals ruling on the issue [1] has determined that the Secretary's regulation is not valid and that Medicare providers should be reimbursed for their services under the prior utilization method for fiscal year 1979-80 without remand to the Secretary for further rulemaking.

This case began when respondents, non-profit health care facilities [2] participating in the Medicare Program, challenged the procedural and substantive validity of a hastily promulgated regulation (malpractice rule) that drastically changed the reimbursement method for the costs of medical mal-

---

[1] *See* discussion, Section I below.

[2] Respondents, plaintiffs below, are all non-profit health care facilities, including acute care hospitals, hospital-based skilled nursing facilities, and hospital-based home health agencies, located in the Commonwealth of Pennsylvania and participating in the Medicare program.

practice insurance for Medicare patients, 42 C.F.R. § 405.452(b)(1)(ii). Medicare is a health insurance program for the aged and disabled which was enacted in 1965 under Title XVIII of the Social Security Act, 42 U.S.C. § 1395, *et seq.* (the "Medicare Act").

A. The Medicare Act

Under the Medicare Act each provider participating in the Medicare program is entitled to reimbursement for the "reasonable costs" of the services furnished to Medicare patients. 42 U.S.C. § 1395(f)(b). The Medicare Act defines "reasonable costs" as the "costs actually incurred" excluding costs which are unnecessary to the efficient delivery of needed health services. It requires the Secretary to reimburse "both direct and indirect costs." 42 U.S.C. § 1395x(v)(1)(A). The Secretary must promulgate regulations to ensure that the ". . . necessary costs of efficiently delivering covered services to individuals covered by [Medicare] . . . will not be borne by individuals not so covered. . . ." *Id.*

Historically, Medicare paid health care providers for services to Medicare patients by reimbursement of costs in providing the services. Significantly, in 1983 Congress amended the Medicare Act and replaced the reimbursement scheme with a prospective payment system which pays a fixed amount per patient depending upon the diagnosis. 42 U.S.C. § 1395ww. Thus, beginning on or after October 1, 1983, most hospitals have been paid for Medicare services under the prospective payment system.[3]

---

[3] The law provides for a three year phase in period. Thus, after October 1, 1986 most hospitals will be reimbursed entirely under the prospective payment system and not on a reasonable cost basis. This legislation does not apply to the present action, which is for reimbursement under the prior law for the fiscal year ending June 30, 1980. However, the prospective payment legislation demonstrates that the issue presented to this Court is not one of future importance. Thus, as the Court recognized in *Walter O. Boswell Memorial Hospital v. Heckler*, 749 F.2d 788, 791 n.3 (D.C. Cir. 1984): "Events have since largely overtaken the Malpractice Rule."

B. The Utilization Method

Since its inception, Medicare applied a utilization approach to determine the proportion of a provider's total costs to be reimbursed by the program. For example, if Medicare patients used 30% of the services of an operating room of a hospital, Medicare reimbursed 30% of the hospital's allowable reasonable costs associated with the operating room.

Before the malpractice rule, costs associated with malpractice insurance were allocated to Medicare in the same manner as other costs included within the General and Administrative (G and A) cost center. The G and A cost center consistently included all insurance costs, including fire, casualty, workers' compensation and malpractice insurance premiums. Medicare reimbursed these costs in the same manner as all other costs: in proportion to Medicare's utilization of the provider's services. 42 C.F.R. § 405.452(b)(1)(i); Provider Reimbursement Manual, Chap. 22 (HIM-15). (*See,* CCH Medicare & Medicaid Guide, ¶ 6031.) Removing malpractice insurance costs from the G and A cost center, unlawfully destroyed the rationale for pooling all G and A costs and upset the integrity of the entire Medicare cost-finding and apportionment process.

C. The Malpractice Rule

The malpractice rule established what the Secretary labeled a "unique exception" to the traditional Medicare utilization approach. C.A. App. 81-82. The rule singled out malpractice insurance costs from all other costs for special treatment.[4] The rule reimbursed malpractice insurance costs on the basis of the provider's recent paid claims experience or, if a provider had no malpractice paid claims for the previous five

[4] Some of the purported facts in the Secretary's Statement (Pet. 3-11) are undocumented, others are not supported by the references in the Petition, respondents vigorously disagree with most, and the court below rejected many. Without belaboring every point, by way of example, the Secretary cited as the sole basis for the malpractice rule the Medical Malpractice Closed Claim Study ("We[illegible]port"). Pet. 5. All circuit courts have concluded that it is defective and [illegible]t a valid basis for the rule. *See* cases cited in notes 5 and 6 below, including *Boswell, supra.* Thus, many of the purported "facts" in the Petition have been discredited by the lower courts.

years, on the basis of a purported "national ratio" of 5.1% for the cost reporting year at issue. *Id.* All other G and A costs, as well as all other provider costs, were still reimbursed under the traditional utilization approach.

Malpractice premiums are simply not based upon past paid claims. Malpractice insurance premiums reflect many items other than paid claims, such as expected loss costs, expected expenses, and a margin to cover variations in claim costs and investment income. Providers purchase malpractice insurance to protect against all claims whether or not such claims are ultimately paid. Paid claims can vary from year to year from zero to several million dollars. Malpractice insurance is necessary for providers to service all patients. C.A. App. 241-247.

The fundamental premise of the malpractice rule is flawed. Although there is no direct connection between premium costs and past paid claims, that is the sole basis of the regulation. The malpractice rule is premised upon the faulty assumption that apportioning the cost of malpractice insurance on the basis of a provider's past five years' paid claims reimburses the actual cost of insuring Medicare patients for potential future claims. There is absolutely no evidence in the record before the administrative agency to establish that paid claims during the past five years provides a reasonable cost related basis for apportioning the cost of malpractice insurance between Medicare and non-Medicare patients. The overwhelming evidence in the administrative record establishes that past claims paid for either Medicare or non-Medicare patients is not a reasonable method for apportioning the actual cost of insuring Medicare patients.

To illustrate the impact of the malpractice rule and its arbitrary and bizarre results, assume that hospitals X and Y both had premium costs of $100,000, utilization rates of 30% Medicare patients, and one paid claim during the relevant five year period. Hospital X paid its claim to a Medicare patient, while Hospital Y paid its claim to a non-Medicare patient. Under the traditional utilization approach, both hospitals

would receive $30,000 in reimbursement (30% x $100,000). In contrast, under the malpractice rule, Hospital X is reimbursed its entire premium cost of $100,000 even if its paid claim was $25 and even though some of its premium cost is also reimbursed from other third-party payors such as Blue Cross and commercial insurers. Hospital Y is not reimbursed for any of its premium costs. Thus, Hospital Y is totally denied Medicare reimbursement for expenses which are indisputably necessary and proper costs of rendering care to Medicare patients. By way of further contrast, Hospital Z, with malpractice premium costs of $100,000, a 30% utilization rate and no paid claims during the five year period is reimbursed 5.1% of its malpractice premium costs or $5,100, whether its utilization rate is 1% or 99%.

Under the malpractice rule, reimbursement of malpractice costs bears no relationship to premium costs actually incurred with respect to Medicare patients. The rule creates serious inequities among providers and disregards the statutory mandate under the Medicare Act for reimbursement of the reasonable necessary costs actually incurred. 42 U.S.C. § 1395x(v)(1)(A).

D. Proceedings Below

For fiscal year 1979-80, respondents were reimbursed under the malpractice rule rather than on the basis of Medicare utilization. Respondents challenged the malpractice rule by appealing to the Provider Reimbursement Review Board (PRRB). The PRRB found that it lacked authority to decide the validity of the malpractice rule and directed judicial review of the providers' appeal pursuant to 42 U.S.C. § 1395oo(f)(1).

Respondents filed actions in the United States District Courts for the Eastern, Middle and Western Districts of Pennsylvania. These actions were consolidated by consent in the Eastern District.

Upon cross motions for summary judgment, the district court entered judgment in favor of the providers. The court held that the Secretary's basis and purpose statement was "woefully inadequate" in that it failed to adequately respond to

the overwhelming negative public comments on the proposed rule and failed to address the comments pointing out the defects in the Westat Report, the sole basis of the rule. Thus, the Secretary violated the procedural requirements of the APA in promulgating the Rule. Pet. App. 18a.

The district court also found that the malpractice rule was arbitrary and capricious and an abuse of discretion in violation of § 706(2)(A) of the APA because it was based upon faulty, biased data, produced bizarre and unfair reimbursement consequences and was inconsistent with other Medicare reimbursement practices. Pet. App. 19a-20a.

Finally, the district court concluded that the malpractice rule was substantively invalid under the Medicare Act because it failed to reimburse hospitals for costs reasonably incurred in treating Medicare patients. Pet. App. 25a-26a. The district court noted that a hospital's malpractice insurance costs are not established solely with reference to its paid claims history and that they are a necessary though indirect cost of providing health care to Medicare patients and assure continuity of service to the benefit of all patients. *Id.* Therefore, the district court concluded that the malpractice rule was inconsistent with and failed to meet the requirements of the Medicare Act. Pet. App. 27a.

Upon respondents' motion, which the Secretary did not oppose, the district court clarified its order granting summary judgment to require that the matter be remanded to the PRRB for reimbursement rather than to the Secretary for further proceedings. C.A. App. 1 (Doc. No. 51).

The Secretary appealed the district court's decision to the United States Court of Appeals for the Third Circuit. On December 13, 1984, that court affirmed the district court's decision and adopted its well reasoned opinion invalidating the malpractice rule. Pet. App. 1a-10a and 29a-30a. The Third Circuit denied the Secretary's specific request that the matter be referred to her for further rulemaking on the grounds that after invalidating the exception, the general reimbursement rule remained operative and that the providers had already waited

long enough for reimbursement for the 1979-80 fiscal year. The Secretary's petition for rehearing was denied on February 14, 1985. Pet. App. 31a-33a.

The Secretary filed her petition for writ of certiorari on July 14, 1985. Respondents oppose the request that this Court grant certiorari.

REASONS FOR DENYING THE PETITION

There are no special and important reasons for granting certiorari in this case. Since all seven courts of appeals that have ruled on the validity of the malpractice rule have invalidated it, there is no conflict among the circuits and no basis for the Secretary's claim of unevenhanded administration of the Medicare program. Inasmuch as most providers are now being paid for services to Medicare patients primarily on the basis of diagnosis and not on the reasonable cost basis, this case does not present an issue of continuing importance.

I. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS.

A. All Seven Circuit Courts and Substantially All District Courts Have Invalidated the Malpractice Rule.

The malpractice rule has suffered resounding defeats in all eight circuit court cases without a single dissent.[5] All seven courts of appeals that have ruled on the validity of the

[5] *St. James v. Heckler*, 760 F.2d 1460 (7th Cir. 1985); *Humana of Aurora, Inc. v. Heckler*, 753 F.2d 1579 (10th Cir. 1985); *Lloyd Noland Hospital and Clinic v. Heckler*, 762 F.2d 1561 (11th Cir. 1985); *Abington Memorial Hospital v. Heckler*, 750 F.2d 242 (3rd Cir. 1984); *DeSoto General Hospital v. Heckler*, No. 84-3577 (5th Cir. July 5, 1985); *Menorah Medical Center v. Heckler*, No. 84-2257 (8th Cir. July 24, 1985); *Bedford County Memorial Hospital v. Health and Human Services*, No. 84-1672 (4th Cir. August 14, 1985). Additionally, the District of Columbia Court of Appeals remanded the *Boswell* case to the district court for reconsideration after review of the full rule-making record. *Boswell, supra*, 749 F.2d at 790.

malpractice rule have held it invalid. Moreover, of thirty-two district court decisions, twenty-six invalidated the malpractice rule.[6] All six decisions which upheld the validity of the rule [7] were based upon the *Athens* and *Boswell* district court decisions

---

[6] *Mt. Carmel Mercy Hospital v. Heckler,* 581 F.Supp. 1311 (E.D. Mich. 1983); *Chelsea Community Hospital v. Heckler,* Civ. No. 83-6126-AA (E.D.Mich. Dec. 20, 1983); *Albany General Hospital v. Heckler,* 584 F.Supp. 614 (D.Ore. 1984); *St. James Hospital v. Heckler,* 579 F.Supp. 757 (N.D.Ill. 1984), *aff'd,* 760 F.2d 1460 (7th Cir. 1985); *Humana of Illinois, Inc. d/b/a Springfield Community Hospital v. Heckler,* 584 F.Supp. 618 (C.D.Ill. 1984), *aff'd,* Nos. 84-1478, 84-1727 (7th Cir. Apr. 18, 1985); *Bedford County Memorial Hospital v. Heckler,* 583 F.Supp. 367 (W.D.Va. 1984) *aff'd,* No. 84-1672 (4th Cir. August 14, 1985); *Alexandria Hospital v. Heckler,* 586 F.Supp. 581 (E.D.Va. 1984) *aff'd,* No. 84-1672 (4th Cir. August 14, 1985); *Lloyd Noland Hospital and Clinic v. Heckler,* Civ. No. 83-PT-0868-S (N.D.Ala. Apr. 6, 1984), *aff'd,* 762 F.2d 1561 (11th Cir. 1985); *Metropolitan Hospital, Inc. v. Heckler,* Civ. No. C83-502A (N.D.Ga. June 25, 1984), *aff'd,* Nos. 84-7444, 84-8699 (11th Cir. June 12, 1985); *Parkway Medical Center, et al. v. Heckler,* Civ. Nos. 83-1005, 83-1700 (S.D.Fla. Sept. 24, 1984); *DeSoto General Hospital v. Heckler,* Civ. No. 83-1050-B (M.D.La. June 22, 1984), *aff'd,* No. 84-3577 (5th Cir. July 5, 1985); *East Jefferson General Hospital v. Heckler,* Civ. No. 83-4107-C (E.D.La. Oct. 19, 1984); *Menorah Medical Center v. Heckler,* Civ. No. 83-0822-CV-W-4 (W.D.Mo. July 26, 1984) *aff'd,* No. 84-2257 (8th Cir. July 24, 1985); *Mercy Medical Center and Unity Medical Center v. Heckler,* Civ. No. 3-82, 1724 (D.Minn. Aug. 17, 1984); *Sisters of St. Mary, et al. v. Heckler,* Civ. Nos. 83-0789C(4), 83-1604C(C) (E.D.Mo. Nov. 6, 1984); *Arkansas Methodist Hospital, et al. v. Heckler,* Civ. Nos. J-C-83-106, J-C-83-148 (E.D.Ark. Nov. 1, 1984); *St. Anthony Regional Hospital, et al. v. Heckler,* Civ. No. C-84-37 (N.D. Iowa Oct. 12, 1984); *Marshalltown Area Community Hospital v. Heckler,* Civ. No. 84-226-B (S.D.Iowa Dec. 17, 1984); *Bethesda Hospital v. Heckler,* Civ. No. C-1-83-622 (S.D.Ohio Apr. 30, 1985); *St. Joseph's Hospital v. Heckler,* 583 F.Supp. 1545 (D.Ariz. 1984); *Charter Medical Corp. v. Heckler,* 604 F.Supp. 638 (M.D.Ga. 1985); *Abington Memorial Hospital v. Heckler,* 576 F.Supp. 1081 (E.D.Pa. 1983) *aff'd,* 750 F.2d 242 (3rd Cir. 1984); *Tallahassee Memorial Regional Med. Ct. v. Heckler,* No. TCA 83-7128-WS (N.D. Fla. June 21, 1985); *Brentwood Hospital Inc. v. Heckler,* No. 83-0502 (W.D. La. July 3, 1985); *Adair County Health Center Inc. v. Heckler,* Civ. No. 84-771-E (W.D. Okla. July 25, 1985); and *Lifemark Hospitals of Texas, Inc. v. Heckler,* Civ. No. G-83-315 (S.D. Tex. August 13, 1985).

Although the decisions in *Charter Medical Corp., supra, Tallahassee Memorial, supra,* and *Brentwood Hospital supra,* were decided before the petition was filed, they are not mentioned or cited in the petition.

[7] *Athens Community Hospital v. Heckler,* 565 F.Supp 695 (E.D. Tenn. 1983); *Cumberland Medical Center v. Heckler,* 578 F.Supp. 39 (M.D. Tenn. 1983); *Benton County General Hospital v. Heckler,* Civ. No. 82-1289 (W.D.

(footnote continues)

which were decided without the full administrative record and before the *Abington* decision. Moreover, of those six decisions, one has been reversed, one has been vacated and remanded and one is presently before the Eighth Circuit upon the providers' motion for summary reversal on the basis of the contrary circuit court decision in *Menorah Medical Center, supra.*[8]

Indeed, although the petition includes half-hearted arguments on behalf of the malpractice rule, recognizing that it cannot be sustained as promulgated, the Secretary suggests that those issues are not ripe for plenary review. Pet. 15. Thus, the overwhelming case law invalidating the malpractice rule, particularly the unanimity of the circuit court decisions and the Secretary's preference to avoid review, demonstrate that review of this case is not warranted.

B. The Remand of *Boswell* Because of the Inadequate Record Does Not Establish Conflict Among the Circuits.

The Secretary attempts to create a conflict among the circuit courts where none exists. Although the petition refers to dicta of the Court in *Boswell, supra,* Pet. 8, 14-15, the District of Columbia Court in *Boswell* held that the case must be remanded to the district court to consider the full rulemaking record which had not been before it at the time of its decision.[9]

(footnote continued)

Tenn. Oct. 25, 1983); *Humana of Aurora, Inc. d/b/a/ Aurora Community Hospital v. Heckler,* Civ. No. 83-Z-70 (D.Colo. Sept. 25, 1983), *rev'd,* 753 F.2d 1579 (10th Cir. 1985); *Walter O. Boswell Memorial Hospital v. Heckler,* 573 F.Supp. 884 (D.D.C. 1983), *remanded* 749 F.2d 788 (D.C. Cir. 1984); *Normandy Osteopathic-North Hospital v. Heckler,* Civ. No. 83-1687C(1) (E.D. Mo. Dec. 21, 1984), appeal docketed, No. 85-1247 (8th Cir. Feb. 19, 1985) (motion for summary reversal filed Aug. 8, 1985).

[8] *See* note 7 above.

[9] Moreover, the courts have specifically interpreted the *Boswell* decision as a resounding defeat for the Secretary: "The District of Columbia Circuit clearly signalling its view remanded a district court decision upholding the rule." *DeSoto General Hospital, supra,* slip op. at 5. "... the District of Columbia Circuit has strongly suggested that the Secretary has engaged in arbitrary and capricious action in enacting the malpractice rule." *Brentwood Hospital, Inc., supra,* slip op. at 12. *See also Lloyd Noland, supra,* 762 F.2d at 1566-67 and *St. James, supra,* 760 F.2d at 1467, 1471.

The D. C. Circuit did not make any determination of the substantive issues in the case. Thus *Boswell* is not inconsistent with the holding of the Third Circuit or the other six circuits which invalidated the rule.

The Secretary's reliance on dicta in *Boswell* cannot create a conflict between the circuit courts. The virtually unanimous case law invalidating the malpractice rule, demonstrates that review by this Court of the extensively litigated issues would be a needless waste of judicial resources.

II. THE LIMITED RELIEF ORDERED BY THE THIRD CIRCUIT HAS BEEN UNANIMOUSLY APPLIED BY THE OTHER COURTS CONSIDERING THE ISSUE.

The Third Circuit properly remanded providers' appeals to the PRRB for reimbursement of their malpractice costs for fiscal year 1979-80 under the apportionment method:

> Thus, the specific relief of our decision is limited to remanding to the Provider Reimbursement Review Board, with the instruction that appellees be awarded reimbursement in accordance with our decision, for malpractice insurance costs incurred during the fiscal year ending June 30, 1980. Pet. App. 10a.

The Court specifically rejected the Secretary's request to remand for further rulemaking [10] on the grounds that the request was inequitable since the providers had already waited nearly five years (now even a longer time period has elapsed) to be properly reimbursed:

> The delay already present in this case also informs our decision not to remand for further rulemaking. Plaintiffs seek reimbursement for the 1979-80 fiscal year, and have already waited almost five years for a

---

[10] The Secretary's support for this suggestion purports to be based on an incomplete reference to the district court decision which actually dealt with a different issue. Pet 11, n. 10. The court actually stated:

> But, while the previous utilization rate method of allocation is not the only possible method, it seems self-evident that any method of allocation which totally ignores utilization rates fails to meet the requirements of the [Medicare] statute. Pet. App. 27a.

> final determination. It would be inequitable to allow the Secretary to delay further, by second chance rule-making, reimbursement payments owed to the hospitals and healthcare providers. (Pet. App. 9a.)

The limited relief granted by the Third Circuit in this case is consistent with the directives of the APA which provide that a court in reviewing agency action is empowered to " . . . compel agency action unlawfully withheld or unreasonably delayed; and . . . hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law . . . . " 5 U.S.C. § 706(1)(2)(A)(D). As the District of Columbia Court of Appeals stated in *Action on Smoking and Health v. CAB,* 713 F.2d 795 (D.C. Cir. 1983), after invalidating unlawfully promulgated regulations, " . . . the judgment of this Court had the effect of reinstating the rules previously enforced . . . . " *Id.* at 797.

The limited relief awarded by the Third Circuit is also consistent with the Medicare Act. 42 U.S.C. § 1395ff. The Court invalidated the unique exception for malpractice costs to the general apportionment rule and thereby entitled providers to the reimbursement for malpractice premium costs they would have received had the regulation been applied without the exception.

Similarly, after invalidating the malpractice rule, the court in *Lloyd Noland Hospital, supra,* 762 F.2d at 1569 remanded to the PRRB for payment under the utilization method, holding:

> The only proper result is to pay the hospital according to existing regulations. The hospitals seek reimbursement for the fiscal year 1979-80. Four years is long enough for them to wait . . . We remand to the PRRB for payment of the hospital's insurance costs . . . without reference to the malpractice rule. . . . (citations omitted)

After invalidating the malpractice exception other courts even after being advised of the proposed rule have also ordered reimbursement for malpractice premium costs in accordance with the prior utilization rule. *Bedford County Memorial Hospital, supra,* slip op. at 17-18; *Menorah Medical Center,*

supra, slip op. at 10-11; *DeSoto General Hospital, supra,* slip op. at 10; *Marshalltown Area Community Hospital, et al., supra,* (order remanding case); *Charter Medical Corporation, supra.,* 604 F. Supp. at 640; *Mercy Medical Center, supra,* (final order); *Brentwood Hospital, Inc., supra,* slip op. at 16; and *Lifemark Hospital, supra.*

Similarly in *Northwest Hospital, Inc. v. Hospital Service Corp.,* 687 F.2d 985 (7th Cir. 1982) the Seventh Circuit set aside an exception contained in the Medicare regulations. As a result of invalidating the exception the Court held that the provider was entitled to reimbursement for the expense it would have received had the Medicare regulations been applied without the exception. *Id.* at 995-96. The relief granted by the Third Circuit in the present case is precisely that awarded by the Seventh Circuit in *Northwest Hospital, Inc., supra.*[11]

The Secretary has presented no reason to disturb the relief ordered by the Third Circuit in this case. Indeed, the Secretary recognizes that "... this is not the optimal moment for ... plenary consideration" of the relief granted by the Third Circuit. Pet. 11. We agree.

III. VACATING THE DECISION AND REMANDING THE CASE WILL CAUSE MANIFEST INJUSTICE TO RESPONDENTS AND WILL OVERWHELM THE COURTS WITH DUPLICATIVE LITIGATION

To circumvent the tidal wave of decisions invalidating the malpractice rule, the Secretary boldly asks this Court to vacate the judgment below and remand for second chance rule-making. This request flaunts the power of the courts, and the specific relief ordered by the Third Circuit. Any further delay under the circumstances presented would be manifestly unjust to respondents. In addition, the Secretary's request if granted, would open a flood-gate of unnecessary and duplicative litigation.

The Secretary requests that this Court grant the petition, vacate the decision below and remand the case to allow the

[11] For these reasons, the cases cited by the Secretary at Pet. 16 are irrelevant since they concern agency action in entirely different circumstances than presented in this case.

Third Circuit to reconsider its decision because the Secretary proposes to repromulgate the malpractice rule, 50 Fed. Reg. 25,179 (June 17, 1985). The proposed rule is identical[12] to the present malpractice rule invalidated by the lower courts except for a change in the "national ratio". It purports to be retroactive[13] to the 1979-80 cost reporting year, which is involved in this appeal.

The Secretary's request directly contravenes the Third Circuit's decision not to remand for further rulemaking. Indeed, all courts considering the question have explicitly determined not to remand to the Secretary for second chance rulemaking.[14] Because of the timing of the proposed new rule and the fact that the Secretary admits that she intends to repromulgate the same rule it is obvious that the Secretary is not seeking to exercise her statutory authority but rather to preempt the numerous adverse decisions against her. This blatant attempt to evade the decisions of all seven circuit courts and numerous district courts should not be sanctioned by this Court.

A proposed new rule that has not yet been and may never be promulgated cannot afford a basis for this Court to vacate

---

[12] Thus, if adopted as proposed, the proposed rule is still invalid based upon the reasoning of the many courts invalidating the present malpractice rule. *See* notes 6 and 7 above.

[13] Contrary to the Secretary's assertion (Pet. 16, n. 13), she is not authorized to engage in retroactive rulemaking. See *Daughters of Miriam Center for the Aged v. Matthews*, 590 F.2d 1250, 1258, n. 23 (3d Cir. 1978). *See also Heckler v. Community Health Services of Crawford County Inc.* ____ U.S. ____, 104 S. Ct. 2218, 2220-2221 (1984). *But see Kingsbrook Medical Center v. Richardson*, 406 F.2d 663 (2d Cir. 1973).

[14] *Bedford County Memorial Hospital, supra*, slip op. at 17-18; *Memorah Medical Center, supra*, slip op. at 10; *Lloyd Noland Hospital, supra*, 762 F.2d at 1569; *Abington Memorial Hospital, supra*, 750 F.2d at 244; *Charter Medical Corp., supra*, at 640-41. *Marshalltown Area Community Hospital*, Civ. No. 84-266-B (S.D. Iowa April 23, 1985), *Brentwood Hospital, Inc., supra*, slip op. at 16. *Mercy Medical Center, supra*, (D.Minn. Dec. 7, 1984) (final order).

the decision by the Third Circuit which applied the law in effect at the time of its decision.[15] In *Roosevelt Campobello Intern Park v. U.S.E.P.A.*, 684 F.2d 1034, 1040 (1st Cir. 1982), the EPA proposed to amend a rule but had not done so at the time of the Court's decision. The court declined to address the proposed rule "... in a hypothetical context, when it may never be necessary to do so." The court noted that after considering comments the EPA might never promulgate the amendment or that relevant court decisions may affect its determination.

Similarly, in this action there is no reason to vacate the Third Circuit judgment invalidating the malpractice rule on the basis of a proposed rule that may never be issued. If as suggested in the Petition at 11-12 the Secretary has already decided to promulgate the new rule, irrespective of the comments that she may receive, then she is conducting a sham rulemaking.[16] If the comments are carefully considered, the new rule should never be promulgated. Thus, there is no basis to vacate and remand the decision below.

The issues decided by the court below have been litigated for six years. Now, the Secretary seeks to avoid complying with the Third Circuit's decision that the providers must be reimbursed for their 1979-80 costs according to the utilization method. The Third Circuit explicitly rejected the Secretary's request as inequitable. Pet. App. 9a. Contrary to the Secretary's assertions (Pet. 11), the respondents will not receive an unwarranted windfall but rather reimbursement for costs actually incurred. In light of the unanimous decisions of the circuit courts and the overwhelming number of district court decisions invalidating the rule, and where the Third Circuit limited its award of relief to the 1979-80 fiscal year, respondents, are not

---

[15] The cases cited by the Secretary (Pet. 16) that a court apply the law in effect at the time it renders its decision are irrelevant. Moreover, those same cases recognize an exception to the application of the law in effect at the time where manifest injustice may result. *See also Greene v. United States*, 376 U.S. 149, 160-61 (1964).

[16] The Secretary's recent rulemaking is an invalid attempt after the fact to buttress a defective administrative record. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1973).

being singled out for special treatment. Moreover, in light of the lower court decisions, it is manifestly unfair to deny them reimbursement any longer.

As the Court in *Action on Smoking and Health v. CAB*, 713 F.2d at 798-99 (footnote omitted), clearly stated: "An agency cannot remedy a deficiency in one regulation by promulgating a new rule equally defective for the same or other reasons." Yet, that is precisely what the Secretary asks this Court to allow her to do. If and when a new rule is promulgated that rule will be subject to appropriate administrative challenges, and if necessary, judicial review.

The relief sought by the Secretary could create endless litigation with no resolution of the question of the amount of reimbursement to which the respondents are entitled for malpractice premiums for a cost reporting period that ended more than six years ago.[17] The Secretary's suggestion would require the same issue to be relitigated at least three times. This Court should not require the respondents to relitigate for the 1979-80 cost reporting year[18] issues on which they have already prevailed in two courts and also to litigate the same issues for subsequent cost reporting years for which the Secretary will undoubtedly contend that different considerations apply.

If and when the Secretary promulgates a new rule, and if she fails in her second chance rulemaking, should she be permitted to create a series of new records and again tie up the court system in endless litigation? In essence, this would permit the Secretary to prevent respondents from ever receiving proper reimbursement for the 1979-80 cost reporting year.[19] This is

---

[17] Given that the Secretary suggests that the whole malpractice issue should be relitigated based on a new record, her professed concern for furthering the interest of "judicial economy" is illusory. Pet. 15.

[18] For these reasons we respectfully request that if this Court determines not to deny certiorari, it grant the petition and set the case for briefing and argument. *Cf.* Pet. 17, n. 14.

[19] To deny respondents reimbursement for fiscal year 1979-80 would discourage any challenge to unlawful reimbursement regulations since the plaintiffs would incur substantial litigation expenses without receiving the benefit for which they instituted the litigation.

particularly evident where, as in this case, the Secretary has not proposed to establish a new rule, but rather has proposed to "repromulgate" the same rule. 50 Fed. Reg. 25,179 (June 17, 1985).

For these reasons, even if a new rule is promulgated, to vacate the decision below is to reward the Secretary for conceding that her position in this case is not supported by the Medicare Act. By such means the Secretary could postpone indefinitely her obligation to properly reimburse respondents. This Court should reject the Secretary's request for unending litigation.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JANE DALTON ELLIOTT

ROLAND MORRIS
JANE DALTON ELLIOTT
DAVID E. LODER
DUANE, MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, PA 19102

Attorneys for Respondents

August 19, 1985

CERTIFICATE OF SERVICE

Civil No. 85-52

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*

v.

ABINGTON MEMORIAL HOSPITAL, *et al.*

I, David E. Loder, a member of the Bar of this Court, certify that on August 19, 1985, I caused 3 copies of the "Brief In Opposition" to be sent by prepaid first class United States mail to the following counsel for appellees:

LAWRENCE G. WALLACE, ESQ.
Assistant Solicitor General
DEPARTMENT OF JUSTICE
10th & Constitution, N.W.
Washington, D.C. 20530

DAVID E. LODER

DAVID E. LODER